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EXHIBIT 3

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99TH CONGRESS 2d Session | SENATE | REPORT 99-307

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1987 FOR INTELLIGENCE ACTIVITIES OF THE UNITED STATES GOVERNMENT, THE INTELLIGENCE COMMUNITY STAFF, THE CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM (CIARDS), AND FOR OTHER PURPOSES

MAY 21 (legislative day MAY 19), 1986.—Ordered to be printed

Mr. DURENBERGER, from the Select Committee on Intelligence, submitted the following

REPORT

[To accompany S. 2477]

The Select Committee on Intelligence, having considered the original bill (S. 2477) authorizing appropriations for fiscal year 1987 for intelligence activities of the U.S. Government, the Intelligence Community Staff, the Centeral Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

This bill would:

(1) Authorize appropriations for fiscal year 1987 for (a) intelligence activities of the United States, (b) the Intelligence Community Staff, and (c) the CIA Retirement and Disability System;

(2) Authorize the personnel ceilings as of September 30, 1987 for (a) the Central Intelligence Agency, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the U.S. Government;

(3) Authorize the Director of Central Intelligence to make certain personnel ceiling adjustments when necessary to the performance of important intelligence functions;

(4) Make several legislative changes designed to enhance intelligence and counterintelligence capabilities and to promote the more effective and efficient conduct of intelligence and counterintelligence activities.

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tions, primarily because of state and local legislation triggered by, and similar to, the Privacy Act.

An example of the difficulty in obtaining criminal history record information for purposes of conducting a background investigation can be found in one State where the FBI's offices have been precluded from access to the criminal justice information system for the purpose of conducting background investigations because the State's Department of Justice has interpreated the State's Freedom of Information/Privacy Acts, which prohibit use of information developed by law enforcement agencies for other than law enforcement purposes, to exclude background investigations from the realm of law enforcement purposes. Even with a release from the applicant, some information has been withheld.

Other states have similar laws restricting the use of criminal record information for employment purposes. To date these laws have not been interpreted to preclude FBI access to the records for the purpose of conducting background investigations. There is no guarantee, however, that these states may not take a different position in the future. A change in position by these states to deny the FBI these records could drastically reduce the ability of the FBI to obtain complete criminal record information for background investigations.

To address these current and potenital problems section 502 adds the FBI to those agencies entitled under section 9101 of title 5, United States Code, to obtain access to state and local criminal history records. This will ensure that the FBI can adequately fulfill its responsibilities in conducting background investigations.

Telephone Toll Records

Section 503 amends chapter 33 of title 28, United States Code, to grant the FBI authority to obtain telephone subscriber information or toll billing record information from a communications common carrier for counterintelligence purposes if the Director of the Federal Bureau of Investigation (or the Director's designee) finds that there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

The legislative history of the Foreign Intelligence Surveillance Act explains the vital importance to the FBI of information about the communications used by persons engaged in espionage or international terrorism. That Act provides authority for the FBI to monitor such communications by acquiring the contents of a wire communication or by other means that would require a warrant for law enforcement purposes. The FBI does not currently possess any similar mandatory authority for access to telephone subscriber information or toll billing record information. Section 503 provides the mandatory access the FBI needs to perform its counterintelligence functions effectively.

The FBI has stated that most communications common carriers cooperate voluntarily with the FBI in making available telephone subscriber information or toll billing record information. Currently, to gain access to such records, the FBI issues a letter, called a "national security letter," signed by an appropriate supervisory official and seeking telephone subscriber information or toll billing record information relevant to FBI counterintelligence activities. Pursuant to an agreement reached approximately ten years ago between the Department of Justice and AT&T, national security letters are generally sufficient to provide access to such information without use of subpoenas in counterintelligence investigations. However, the FBI has advised the Committee that in certrain significant instances, communications common carriers have declined to grant the FBI access to such records. The FBI informed the Committee that the problem occurs particularly in States which have laws or regulatory bodies prohibiting communications comon carriers from granting such access.

Section 503, by providing for mandatory FBI access to telephone subscriber information or toll billing record information for counterintelligence purposes in certain circumstances, preempts State laws or regulatory orders to the contrary which otherwise would not permit such access. The mandatory nature of the provisions also protects communications common carriers from the possibility of liability under State privacy law.

Section 503 amends chapter 33 of title 28, United States Code, by adding to it a new section 538 on "Counterintelligence Access to Telephone Toll Records."

Subsection 538(a) as added by section 503 of the bill provides that communications common carriers shall comply with an FBI request for access to telephone subscriber information or toll billing record information upon receiving the certificate in writing of the Director of the FBI (or the Director's designee) that the FBI seeks the records for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801). The term "entity" includes all forms of organizations, such as partnerships, associations, corporations, and governments. The term "foreign counterintelligence purposes" includes both the purpose of countering intelligence activities of foreign powers and their agents and the purpose of countering international terrorist and activities.

The Committee expects that, if the Director of the FBI delegates his function under this provision, he will delegate it no further down the FBI chain of command than the level of Deputy Assistant Director. The Committee also recognizes that the Director may delegate to the head or acting head of an FBI field office the authority to make the required certification in exigent circumstances where time is of the essence, provided that the Director is notified as soon as possible of the circumstances involved.

The new mandatory FBI authority for counterintelligence access to records is in addition to, and leaves in place, existing non-mandatory arrangements for FBI access based on voluntary agreement of communications common carriers. Although the existing FBI non-mandatory arrangements require only that a "national security letter" state that the requested information is relevant to FBI counterintelligence activities regardless of the status or activities of the person to whom the information pertains, the Committee believes it important in establishing the additional authority for mandatory FBI access to limit that mandatory authority to use only to obtain records where there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power. The Committee notes that the requirement of "reason to believe" is less stringent than the requirement of "probable cause" which is used as the standard for authorization of electronic surveillance under the Foreign Intelligence Surveillance Act. The federal courts have not required either a judicial warrant or a probable cause standard for access to telephone subscriber information or toll billing record information. *Reporter's Committee for Freedom of the Press* v. *AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). The Committee believes that both First and Fourth Amendment principles are fully satisfied by requiring a determination that there are specific and articulable facts giving "reason to believe" that the person or entity to whom the information sought by the FBI pertains is or may be a foreign power or an agent of a foreign power. The meaning of "reason to believe" in section 503 is the same as in section 501.

In addition, the Committee recognizes that in some circumstances the target of an investigation may use the telephone of another person. Therefore, the Foreign Intelligence Surveillance Act authorizes the surveillance of a telephone line based on its use by a foreign agent, whether or not the telephone is listed in the foreign agent's name. For the same reason, section 503 authorizes access to telephone subscriber information or toll billing record information which pertains to a foreign power or an agent of a foreign power who is believed to use a particular telephone, whether or not the telephone is listed in the name of the foreign power or agent of a foreign power.

Subsection 538(b) as added by section 503 of the bill provides that the FBI may disseminate information obtained pursuant to the mandatory access provisions only as provided in the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, and, with respect to dissemination to an agency of the United States, such as another federal law enforcement or intelligence agency, only if the FBI determines that such information is clearly relevant to the authorized responsibilities of such agency. The requirement of clear relevancy for dissemination to another federal agency ensures that the FBI will not automatically and routinely disseminate telephone subscriber information or toll billing record information the FBI obtains from a communications common carrier using the mandatory procedures.

Subsection 538(c) as added by section 503 of the bill requires the FBI Director to report semiannually to the intelligence committees of the Congress concerning all FBI requests for access to telephone subscriber information or toll billing record information made pursuant to the mandatory provisions added to title 28 by section 503. This reporting requirement is in addition to the requirements contained in Title V of the National Security Act of 1947, which concerns congressional oversight of intelligence activities. The report should follow the model of the semiannual report required under the Foreign Intelligence Surveillance Act.

Subsection 538(c) ensures that no communications common carrier, or officer, employee, or agent thereof, will disclose to anyone that the FBI has sought or obtained access to telephone subscriber information or toll billing record information under the mandatory access provisions. The effective conduct of FBI counterintelligence activities requires such non-disclosure. The Committee expects the FBI, in implementing the new mandatory authority, to ensure that certificates executed pursuant to subsection 538(a) by the Director of the FBI (or his designee) and shown to a communications common carrier to gain access to information, remain on file with the FBI, both to satisfy internal and congressional oversight needs and to provide protection from any possible legal liability for the communications common carrier.

TITLE VI—PROTECTION OF UNITED STATES INTERESTS

Since 1984, the Committee has sought the establishment of national policies to restrict the presence in the United States of intelligence officers from the Soviet Union and other nations whose intelligence activities within the United States are contrary to our national interests. The Intelligence Authorization Act for FY 1985 contained a requirement that the President submit annual reports on the numbers and treatment of official representatives in the United States from those countries and on the numbers and treatment of U.S. representatives in those countries. The Intelligence Authorization Act for FY 1986 contained a provision offered by Senators Leahy and Cohen which establish a policy that the number of Soviet embassy and consular officials in the United States should be substantially equivalent to the number of U.S. embassy and consular officials in the USSR. The fundamental purpose of these provisions was to achieve, through a policy of equivalence, a lessening of the burdens placed on FBI counterintelligence by the large number of intelligence officers operating under official cover in the United States.

While the Administration has taken some steps in this direction, the Committee is very disappointed with the response to the two legislative requirements. The first Presidential report under the FY 1985 Act was due in November, 1985, but has not yet been submitted to the Committee. The Committee has received from the Secretary of State and the Attorney General the plan for achieving "substantial equivalence" between U.S. and Soviet embassy and consular officials, but the plan does not meet the intent of the Committee as set forth in the Committee Report on the FY 1986 Act. The Report stated that the Executive branch should develop "an approach for attaining equivalence within a reasonable time through attrition of Soviet personnel in the United States, an increase in the number of American personnel in the Soviet Union, or a combination of both." The plan submitted to the Committee fails to reduce the number of Soviet embassy and consular officials in the United States. Instead, the plan provides for an increase in the numerical ceiling on Soviet personnel on the grounds that the Soviets need additional positions for their new consulate in New